Supreme Court, U.S.
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NO. 04-1304

IN THE SUPREME COURT OF THE UNITED STATES

ALLEN OIL & GAS, L.L.C.,

Petitioner,

vs.

MICHAEL KLISH, BRUCE JOHNSON, DANIEL SKRABACZ, and ADRAN PHILLIPS,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 20, 2005

QUESTIONS PRESENTED FOR REVIEW

1. Did the Tenth Circuit misapply the standards of Fed.R.Civ.P. 12(b)(6) when it affirmed dismissal of Allen Oil & Gas, L.L.C.'s ("AOG's") complaint for failure to state a claim on which relief could be granted?

2. Did the Tenth Circuit err when it affirmed the District Court's determination that amendment would be futile, as there are no facts which AOG could plead to support its claims?

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Respondents Michael Klish, Bruce Johnson, Daniel Skrabacz and Adran Phillips respectfully submit the following Brief in Opposition to the Petition for Writ of Certiorari:

OPINIONS BELOW

Each of the documents listed below is attached as a separately identified appendix to this Response brief.

Opinion of the Hon. Judge Edward Nottingham of the U.S. District Court for the District of Colorado, in the form of a transcript of motion hearing, for Case No. 01-CV-1811, Allen Oil & Gas, L.L.C. v. Klish, et.al., dated January 24, 2003, attached hereto as Appendix A. Final Judgment of the U.S. District Court for the District of Colorado for Case No. 01-CV-1811, dated January 30, 2003, attached hereto as Appendix B. Opinion of the U.S. Court of Appeals for the Tent Circuit in Allen Oil & Gas, L.L.C. v. Klish, et.al., 113 Fed.Appx. 869 (10th Cir. 2004), decided on October 26, 2004, attached hereto as Appendix C. Order of the U.S. Court of Appeals for the Tenth Circuit denying AOG's petition for rehearing, dated December 29, 2004, attached hereto as Appendix D.

JURISDICTION

Petitioner invoked the jurisdiction of the U.S. District Court for the District of Colorado under 28 U.S.C. §§ 1331 and 1343 for claims brought under 42 U.S.C. § 1983. The District Court below dismissed the Complaint on January 30, 2003, and Petitioners filed a timely notice of appeal on February 27, 2003. The Tenth Circuit affirmed the judgment of the District Court on October 26, 2004. Petitioner's motion for reconsideration was denied on December 29, 2004. Petitioner filed its Petition for Writ of Certiorari on March 28, 2005.

Jurisdiction to review the decision of the Tenth Circuit Court of Appeals, affirming dismissal by the U.S. District Court of AOG's complaint, is appropriate under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Fed.R.Civ.P. 12(b)(6) provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion … (6) failure to state a claim upon which relief can be granted… .

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

Petitioner AOG is a corporation with its principal offices in Texas. AOG operated oil wells in the State of

Colorado subject to regulation by Colorado's Oil & Gas Conservation Commission ("COGCC"). In this action, AOG sued Respondents under 42 U.S.C. § 1983. Respondents were, at various times, four members of the seven member COGCC. AOG alleged that the COGCC had deprived AOG of its property without due process.

AOG filed its initial complaint in the District Court for the Southern District of Texas, Houston Division. Respondents filed a motion to dismiss on December 19, 2001, alleging lack of personal jurisdiction and lack of subject matter jurisdiction. In their motion to dismiss in Texas, Respondents argued that AOG's complaint failed to make allegations that any of the Respondents individually participated in the alleged wrongdoing. The Texas District Court did not address the personal participation argument, but instead transferred AOG's lawsuit to the U.S. District Court for the District of Colorado.

Despite the arguments made by Respondents in Texas, AOG did not re-plead in the District of Colorado to include facts to show personal participation by the named Respondents. Respondents filed a renewed motion to dismiss AOG's Complaint, alleging, among other things, that AOG failed to allege personal participation by any named Defendant. Following the renewed motion to dismiss, AOG did not ask or attempt to amend its complaint to allege personal participation.

The parties performed extensive written and deposition discovery. Following discovery, Respondents filed a motion for summary judgment and a supplement to their motion to dismiss. As before, the motion for summary judgment pointed out AOG's failure to plead or provide evidence to support personal participation by the named Respondents. Respondents raised the defense of qualified immunity in their supplemental motion to dismiss, and argued that AOG had failed to allege personal participation

by the Respondents. On January 30, 2003, the District Court for the District of Colorado dismissed AOG's claims for failure to allege personal participation, and further found that Respondents were entitled to qualified immunity. The District Court denied AOG leave to amend its complaint, as AOG provided no facts or evidence to show how the complaint could be effectively amended.

The U.S. Court of Appeals for the Tenth Circuit affirmed dismissal of the complaint because AOG failed to allege personal participation by Respondents. The 10th Circuit pointed out that AOG was on notice of Respondents' personal participation arguments prior to transfer of this case from the Southern District of Texas to the District of Colorado. Despite such clear notice, AOG did not amend its claims against Respondents after transfer from Texas to Colorado, nor after the renewed motion to dismiss nor after Respondents' motion for summary judgment.

The 10th Circuit further confirmed that amendment would be futile, noting that although the issue was raised obliquely at the hearing on Defendant's motion for summary judgment, even then AOG did not inform the District Court how it could cure defects in the Complaint.

REASONS FOR DENYING THE WRIT

I. There Is No Need For This Court To Exercise Its Supervisory Authority In This Case.

A. Petitioner was not subjected to a heightened pleading standard.

AOG was not subjected to a "heightened" pleading standard in relation to allegations of personal participation in its complaint. Instead, the U.S. District Court determined, and the 10th Circuit affirmed, that allegations of personal participation are required to state a claim under 42 U.S.C. § 1983. App. at A-10; App. at C-5. AOG concedes in its

Petition that personal participation is a basic element of a § 1983 claim. Petition at p.9. Therefore, the U.S. District Court, in requiring AOG to plead personal participation, identified the minimum standard to be met for AOG to state a claim under § 1983.

At the hearing on Respondents' motion to dismiss, the District Court determined that AOG's complaint failed to "mention any of the defendants by name, describe acts they in particular participated in or otherwise imply that they personally were liable for plaintiff's harm." App. at A-11. This was true despite the fact that AOG "had a full opportunity for discovery… ." App. at A-18.

The District Court concluded as a matter of law that "individual liability under § 1983 must be based on personal involvement in the constitutional violation." App. at A-10. The District Court's determination is supported by applicable Tenth Circuit law. Bennett v. Passic, 545 F.2d 1260, 1262-63 (10th Cir., 1976); Mitchell v. Maynard, 80 F.3d 1433, 1441 (10th Cir., 1996); see also, Rizzo v. Goode, 423 U.S. 362, 376 (1976) (supervisor status without personal participation is not sufficient to support a claim under § 1983).

The District Court then applied Fed.R.Civ.P. 12(b)(6) standards to its findings of fact, noting that dismissal was appropriate where, as here, plaintiff could not prevail and amendment would be futile. App. at A-13. The District Court dismissed AOG's complaint because it failed to state a claim on which relief could be granted, as there were no allegations of personal participation by Respondents. Id. at A-12 & 13.

AOG appealed to the Tenth Circuit. The 10th Circuit affirmed, holding that the District Court applied the appropriate standard under Rule 12(b)(6) to its findings of fact. App. at C-3 & 4.

Apparently in recognition of the deficiency in its complaint, AOG attempted to manufacture allegations of personal participation, alleging that its complaint included the contention that the Respondents *were* members of the Commission at the time of the damaging order. See App. at C-4 & 5. The 10th Circuit pointed out that this allegation by AOG was not true. App. at C-5, fn 2.[1] The Tenth Circuit then noted that AOG admitted that "three of the four Respondents were not members of the Commission in 1999 when the wells were ordered plugged." App. at C-9.

Contrary to AOG's assertion in the Petition, neither of the Courts below held AOG to a heightened pleading standard. Instead, the Courts identified the minimum standard necessary to state a claim under § 1983, and found the complaint lacking. App. at C-6 ("Merely saying that it has shown individual involvement on the part of each defendant does not make it so). Those Courts' decisions are supported by applicable Tenth Circuit law. See, e.g., Bennett, 545 F.2d at 1262-63. Accordingly, this issue does not require this Court to exercise its supervisory authority.

B. Petitioner failed to amend its complaint despite numerous opportunities, and in any event failed to demonstrate how amendment could cure defects in its complaint.

Respondent's assertion that the U.S. District Court *sua sponte* dismissed its complaint is untrue, as AOG was provided with notice of the deficiencies in its complaint on multiple occasions over a period of years, yet refused to amend or re-plead to adequately state a claim under § 1983.

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[1] AOG repeats its false personal participation allegation in the Petition to this Court, stating that "... Respondents were members of the Commission at the time the order in question was entered... ." See Petition at 12.

Instead, in its response to Respondents' motion for summary judgment, AOG requested, for the first time in the proceedings, leave to re-plead if its complaint was lacking. App. at C-8 to 10. Even then, AOG was unable to provide the District Court with a single fact to indicate it could remedy defects in its complaint. App. at C-10.

Ultimately, the District Court granted Respondents' motion to dismiss based on failure to plead personal participation and because Respondents were entitled to qualified immunity.[2] On appeal, the Tenth Circuit reviewed the history of the case, pointing out that Respondents noted the lack of personal participation in three separate dispositive motions dating from the inception of the lawsuit. App. at C-8 to 10. The Tenth Circuit determined that under the circumstances, it was not error to deny leave to amend. App. at C-10.[3]

Similarly, the Tenth Circuit analyzed the District Court's facts and analysis and determined that leave to amend, had it been given, would have been futile, as AOG could allege no facts in support of its claims for relief. App. at C-10. Among other examples, the Tenth Circuit noted that AOG did not dispute that three of the four Respondents were not members of the COGCC in 1999, when the order

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[2] The transcript indicates that the Court found that "personal jurisdiction" was lacking. However, this is likely an error in transcription or an inadvertent misstatement by the Court, as personal jurisdiction was not a disputed issue at that stage of the proceedings. The Court likely meant to identify "personal participation" as the crux issue, as the Court immediately went on to discuss dismissal of the complaint due to AOG's failure to allege "personal participation" by Respondents. App. at A-9.

[3] The Tenth Circuit did not address Petitioner's qualified immunity argument, as the Court affirmed dismissal under Rule 12(b)(6) for failure to state a claim. App. at C-3 & 4.

for AOG's wells to be plugged was issued. App. at C-9. Ultimately, the Tenth Circuit affirmed the District Court's finding that leave to amend, if given, would have been futile. App. at C-10.

Where, as here, a plaintiff has no ability to state a good cause of action, dismissal is appropriate without affording an opportunity to amend. Czosek v. O'Mara, 397 U.S. 25, 27-28 (1970); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Decisions by the courts below dismissing the case without affording Petitioner further opportunity to amend are supported in the record and under applicable law. Accordingly, no issue exists that requires this Court's supervisory powers on review.

CONCLUSION

For the reasons and upon the authorities set forth above, Respondents request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-N-1811

ALLEN OIL & GAS, LLC,
Plaintiff,

vs.

MICHAEL KLISH, et al.,
Defendants.

REPORTER'S TRANSCRIPT MOTION HEARING

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM, Judge, United States District Court for the District of Colorado, commencing at 4:17 p.m., on the 24th day of January, 2003, in Courtroom 14, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff — CLAUDE T. ALLEN, SR.
JOE McDERMOTT, ESQ.
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(APPEARING VIA VIDEO CONFERENCE)

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THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

PROCEEDINGS

THE COURT: Case No. 01-N-1811, Allen Oil & Gas, a limited liability corporation v. Michael Klish, Bruce Johnson, Daniel Skrabacz and Adrian Phillips.

I'll take the appearances of counsel, starting with plaintiff's counsel.

MR. CLAUDE ALLEN: I'm Claude T. Allen, Sr., Your Honor.

MR. McDERMOTT: Judge my name is Joe McDermott, M-c-D-E-R-M-O-T-T. I am not admitted in Colorado, but I am admitted in the Southern District in the Fifth and Eighth Circuits. With the Court's indulgence, would like to be able to assist Mr. Allen today.

THE COURT: Well, you won't be permitted to talk, but you will be permitted to assist him.

You can't appear as an advocate in this court without being admitted to this Court's bar. You may be seated.

MR. WILLIAM ALLEN: William Allen on behalf of all the defendants, Your Honor, in the state of Colorado.

THE COURT: This matter comes before the Court this afternoon on the defendants' renewed motion to dismiss the Complaint and the defendants' motion for summary judgment with incorporated legal authority.

The Court has reviewed the Complaint and the materials submitted by the parties and is of the view that oral argument this afternoon would not materially assist the Court in resolving this matter. Accordingly, the Court does not intend to permit oral argument and will rule on the papers.

This is a case alleging a violation of the plaintiff's civil rights. The plaintiff alleges that the defendants, Michael Klish, Bruce Johnson, Daniel Skrabacz, and Adrian Phillips, individually, members of the Colorado Oil and Gas Commission, stole the plaintiff's wells by plugging certain oil and gas wells.

The defendants are members of the Board of the Oil and Gas Conservation Commission of the State of Colorado. They are residents and citizens of Colorado. The Commission is the regulatory agency governing the production of oil and gas in the state of Colorado.

By way of general factual background, as alleged in the Amended Complaint, the plaintiff was the operator of oil leases located in a field referred to as the Tow Creek Field in Routt County, Colorado.

In November of 1998, after there had been a number of transactions between the parties -- that is to say, between the plaintiff and the Oil and Gas Conservation Commission -- the plaintiff received notice in the form of a recommended order that certain wells located in the Tow Creek Field did not comply with the Commission regulations.

Thereafter, there were certain further proceedings. In January of 1999, the Commission held a hearing regarding the Tow Creek Field wells. At this time,

according to the Complaint, the oil prices were the lowest in history.

According to the Commission, the Commission forced plaintiff to shut down the alleged non-compliant wells until the Commission continued on March of 1999. The hearing did continue in March of 1999, and the revised recommended order issued as a result of that hearing included a recommendation to plug plaintiff's wells that had been shut in during January, allegedly without sufficient or any findings of fact.

At the end of this hearing, the Commission made findings and entered an order directing -- directed to plaintiff regarding the operation of the Tow Creek Field.

The Commission found that the plaintiff's operation of certain main wells in that field was a violation of the Commission regulations. The Commission ordered the plaintiff's shut-in wells to be plugged, imposed a fine on the plaintiff, and ordered plaintiff to post further bond with the Commission in order to be allowed to continue operation of

wells in the Buck Peak Field, another field located in Colorado, but evidently not the subject of the complaint which was then before the Commission.

In May of 1999, plaintiffs sought to amend the application -- excuse me, filed an application to amend the Commission's March of 1999 order. The Commission set a further hearing on that application for July 8, 1999, and that was continued until August 19 and 20 of 1999.

After the August 1999 hearing, the Commission declined to amend its prior order, directing that all of the wells in the Tow Creek Field be plugged. Plaintiff alleges that during the course of the 1999 hearing on August 19, the evidence was well received by Commission Board members. According to the plaintiff, however, on August 20, the hearing went much less well for the plaintiff, and it was apparent to the plaintiff, at least, that the minds of Commission Board members had been changed.

In October of 1999, according to the Complaint, plaintiff filed for judicial review of the Commission's orders in the Colorado State District Court.

On -- in August of 2000, the plaintiff allegedly drove by its Tow Creek Field and found the Commission destroying its property, according to the Complaint. And there is no specification of how the Commission was destroying the property.

Thereafter, the Commission took action to plug wells in another field operated by the plaintiff, the ones that I've alluded to earlier, Buck Peak Field. The Commission set a hearing for the plaintiff's Buck Peak Field matter for October of 1999. The Commission -- the hearing was continued until December of 1999. And according to the Complaint, plaintiff did not receive a written notice of continuance of the hearing, and therefore, did not appear at the December hearing.

The Commission at that hearing found the operation of the Buck Peak Field uneconomic. Accordingly, the

Commission ordered that the wells be plugged in that field and fined the plaintiff.

The plaintiff's Complaint makes three claims. All of them arise under Title 42 United States Code Section 1983. The first is a claim that the defendants' act deprived plaintiff of due process of law under the Fifth and Fourteenth Amendments by taking plaintiff's property without making factual findings for all of the wells.

The second claim alleges that the defendants denied plaintiff's due process rights by denying an impartial hearing in the August of 1999 hearing.

And the third claim is a -- appears to be a substantive due process claim for the defendants' action in ordering the Tow Creek wells plugged and abandoned.

The defendants first filed a motion to dismiss, and thereafter they filed a motion for summary judgment. In the supplement to the motion to dismiss, the defendants added qualified immunity as a defense.

In their original motion to dismiss, they argue that a second claim for relief is based on the actions of a person other than defendants, namely, Rich Griebling, who was a staff person with the Commission. Second, they argue that the plaintiff's claim failed to allege personal participation by any of the defendants.

I find the defendants' arguments regarding personal jurisdiction and qualified immunity to be dispositive of this case. And, accordingly, I address only those issues and will not need to address the issues presented by the motion for summary judgment.

First, I address the question of personal participation by the defendants.

This is a curious Complaint. The Complaint is riddled with allegations concerning actions of the Oil and Gas Commission, and it refers continuously and vaguely to the Commission as having been the body doing the things of which the Complaint complains.

It is curious, therefore, that the Commission, which consists of seven members, is not sued in its official capacity, or in any other capacity, and it is also curious that only four of the seven members are sued.

The plaintiff has never explained this in the Complaint or in any of its pleadings, and the Court does not understand how personal participation can be alleged in these circumstances.

The Court concludes as a matter of law that individual liability under Section 1983 must be based on personal involvement in the constitutional violation.

The plaintiffs contend that the defendants are the members of the Commission who used their authority to deprive plaintiff of its rights and that only the Commission members whose acts violated the plaintiffs rights were sued.

Notably, the plaintiff makes a distinction between the Commission members who violated plaintiff's rights and those who did not. But nothing that the plaintiff has filed in this court indicates how the plaintiffs came by this distinction

or what the distinction might be. The plaintiff does not mention defendants' specific acts to constitute a violation of the rights.

Plaintiff's argument seems to this court to boil down to the proposition that the Commission committed acts that violated the plaintiff's rights, but these defendants were members of the Commission, and therefore, the defendants personally participated in violating the plaintiff's rights.

Notably, however, that the entire Commission did not participate in the violation of the plaintiff's rights dis --itself disproofs this line of reasoning.

The Court finds the Complaint to be sorely lacking concerning any allegations directly against the defendants personally. The Complaint does not mention any of the defendants by name, describe acts that they in particular participated in or otherwise imply that they personally were liable for plaintiff's harm.

In fact, as I have noted before, the Commission is made up of seven members, only four of whom have been

named as defendants. And the Complaint is completely without information as to why this is the case.

I conclude, therefore, that the plaintiff's Complaint fails to allege personal participation by these defendants. This suit against defendants is in their individual capacity, not in their official capacity. And so this is not, in effect, a Complaint against the Oil and Gas Commission.

Accordingly, the plaintiff needs to allege more than the fact that the defendants are members of the Commission and that the Commission violated plaintiff's rights. It has not done so.

There is some suggestion in the papers that the plaintiffs should be given leave -- that the plaintiff should be given leave to replead -- leave to replead on the ground that it can correct the defects that the Court has seen in this respect.

According to Tenth Circuit law, however, dismissal under Rule 12 without affording plaintiff an opportunity to amend is appropriate when it is patently obvious that the

plaintiff cannot prevail under the alleged facts and allowing plaintiff an opportunity to amend may be -- would be futile.

I note that the defendants made this same argument against the plaintiff when the motion to dismiss was filed in the Southern District of Texas before the case was transferred to Colorado. Briefing on the motion was complete before the case was transferred. Discovery is complete in the case, and the dispositive motion deadline has passed without any request by the plaintiff to amend the Complaint.

There is no indication that the plaintiff could amend the Complaint to allege personal participation by the defendants any more specifically than it has attempted to do so in the current Complaint.

The Court finds that it is patently obvious that the plaintiff cannot prevail under the alleged facts and that an opportunity to amend would be futile. Accordingly, the Court will grant the motion to dismiss with prejudice.

A second ground for granting the motion to dismiss is the Doctrine of Qualified Immunity. The Doctrine of

Qualified Immunity shields government officials performing discretionary functions from individual liability under Section 1983, where their actions do not violate clearly established statutory or constitutional rights of which a reasonable person might have known.

Once a defendant puts in issue the question of qualified immunity, the plaintiff bears the heavy burden of demonstrating, first, that the defendants' alleged violation -- alleged actions violated a clearly established constitutional or statutory right. And, second, that the constitutional or statutory right was clearly established at the time of the alleged violation.

The plaintiff must articulate with specificity the clearly established constitutional or statutory right at issue. It is insufficient simply to identify in the abstract a clearly established right and then allege that the defendant has violated it.

For a right to have been clearly established in this circuit, the contours of the right must be sufficiently clear that

a reasonable official would understand that what he is doing violates that right.

In the Tenth Circuit, ordinarily in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established authority from other courts must have found the law to be as the plaintiff maintains.

In the Tenth Circuit, determining qualified immunity under these legal principles is a two-step process. First, the Court must determine whether the plaintiff has met its burden of coming forward with sufficient facts to show that the defendants' actions violated a federal constitutional or statutory right.

Only when the plaintiff has done that will the Court proceed to the second step, to determine whether the right was clearly established at the time of the alleged conduct.

I conclude in these circumstances that the plaintiff has not met the first part of the test for qualified immunity, because it has failed to come forward with sufficient facts to

show that the defendants violated a federal constitutional right.

The plaintiff's Complaint does intone the verbal talismans of due process and violation of the Fourth and Fifth -- Fourteenth and Fifth Amendment, but it is devoid of specific allegations of fact, particularly with regard to the actions of these defendants, as opposed to the actions of the Commission as a whole.

As I have already noted, the Complaint does not even mention any of the defendants by name, except in the caption of the Complaint. It is devoid of specific allegations of fact, particularly with regard to the actions of the Complaint -- the defendants, as opposed to the Commission as a whole.

As I have already noted, it is particularly notable, in light of the fact that plaintiff chose to proceed only against certain Commission members, that it is not violating -- alleging a violation of clearly established rights.

The defendants, having moved to dismiss on the basis of qualified immunity, the plaintiff is obliged to come forward with additional allegations showing that each defendant violated clearly established law. Even in the response to the supplement to the motion to dismiss, plaintiff argues that it meets the first step by noting that it alleges that the defendants violated its constitutional rights, specifically that the acts of the defendant violated its due process rights to notice and an opportunity to be heard, its due process right to be heard by an impartial tribunal, and its substantive due process right to possession of its property without interference with that right under color of law.

This is simply lacking under Tenth Circuit case law in sufficient detail to meet the pleading standards in this circuit. All that the plaintiff has done is to allege in the abstract the violation of a constitutional right, without alleging why that right is applicable or without alleging that each defendant has participated in the violation.

The Court concludes that the plaintiff's Complaint in this case must be dismissed with prejudice. The plaintiff's response to the defendants' supplement, which raised the qualified immunity defense, was filed in this case after discovery was complete and after the dispositive motion deadline had passed.

Even the plaintiff's response, having had a full opportunity for discovery, fails to make specific allegations regarding the defendants' actions.

The plaintiff could have chosen to amend the Complaint or to seek to amend the Complaint. There is a request in the response to the motion to dismiss to replead if the Court finds that the Complaint is lacking. There is no indication, however, that the plaintiff has any further evidence which would support the allegations which it is making.

As the defendant points out as well, the plaintiff was present at the hearings where the alleged improper actions took place, and therefore was in possession of all the

necessary facts. At this point in the case, if plaintiff has not made sufficient allegations, it is reasonable to conclude that it cannot do so.

On the basis of those findings of fact and conclusions of law, the Court grants the motion to dismiss and dismisses the plaintiff's Complaint with prejudice.

The defendants' motion for summary judgment is denied as moot.

The defendants, if they wish, may have their costs upon the filing of a bill of costs within 11 days from today's date.

That concludes this matter.

Counsel are excused. The video conference is ended.

(Hearing concluded at 4:38 p.m.)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO JUDGE EDWARD W. NOTTINGHAM

Civil Action No. 01-N-1811 (MJW)

ALLEN OIL & GAS, LLC

Plaintiff,

v.

MICHAEL KLISH,
BRUCE JOHNSON,
DANIEL SKRABACA, and
ADRAN PHILLIPS, Individually,

Defendants,

FINAL JUDGMENT

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(2), the following FINAL JUDGMENT is hereby entered.

1. Pursuant to the findings of fact and conclusions of law entered orally in open court by Judge Edward W. Nottingham on January 24, 2003:

a. Defendant's Motion to Dismiss Complaint (#8), filed December 19, 2001, is GRANTED.

b. Defendants' motion for summary judgment (#31), filed June 28,2002, is DENIED as MOOT.

c. Judgment is entered in favor of Defendants Michael Klish, Bruce Johnson, Daniel Skrabacz, and Adran Phillips and against Plaintiff Allen Oil & Gas, LLC, and Plaintiff's Complaint and this action are DISMISSED with prejudice.

6. Defendants shall have their costs upon the proper filing of a Bill of Costs within eleven days of January 24, 2003, the date of the court's order.

Dated this 30th day of January, 2003.

APPROVED BY THE COURT:

_____

EDWARD W. NOTTINGHAM
United Stated District Judge

ENTERED FOR THE COURT:
JAMES R. MANSPEAKER, CLERK

By _____
Stephen P. Ehrlich
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Final Judgment signed by Judge Edward W. Nottingham on January 30, 2003 was served on January 30, 2003 by hand-delivery, where a "D.C." box number or asterisk (*) is indicated after the recipient's name, by electronic mail to the address specified where a double asterisk (**) is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

Magistrate Judge Michael J Watanabe*

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JAMES R. MANSPEAKER, CLERK

By _____
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALLEN OIL & GAS, LLC, Plaintiff-Appellant, v. MICHAEL KLISH; BRUCE JOHNSON; DANIEL SKRABACZ; ADRAN PHILLIPS, Defendants-Appellees.	No. 03-1082 (D.C. No. 01-N-1811) (D. Colo.)

ORDER AND JUDGMENT[1]

Before **McCONNELL, HOLLOWAY**, and **PORFILIO,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties'

[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 20th Cir. R. 36.3.

request for a decision on the briefs without oral argument. *See Fed.* R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. Plaintiff Allen Oil & Gas, LLC, appeals the judgment of the district court dismissing its § 1983 complaint for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) and further refusing to grant plaintiff leave to amend its complaint. We exercise jurisdiction pursuant to 28 U.S.C. § 1332 and affirm.

Plaintiff was the operator of oil leases located in Routt County, Colorado. In the complaint, defendants are identified as members of the board of the Colorado Oil and Gas Conservation Commission (Commission). Plaintiff brought suit under 42 U.S.C. § 1983 alleging that defendants affected a taking of its property without due process in derogation of the Fifth Amendment when the Commission ordered some of plaintiff's wells plugged. Specifically, plaintiff alleged, *inter alia,* that defendants denied it the opportunity for a hearing before an impartial

tribunal, prevented it from complying with Commission regulations, and continued a hearing without written notice to plaintiff.

In ruling on defendants' renewed motion to dismiss the complaint, the district court held that because plaintiff failed to allege any personal participation by defendants in the allegedly illegal acts, its complaint was subject to dismissal under Rule 12(b)(6). Because the court found it "patently obvious that the plaintiff cannot prevail under the alleged facts," Aplt. App. at 164, it further denied leave to amend the complaint. Alternatively, the court held that defendants were shielded by qualified immunity.

Plaintiff takes issue with all three of these conclusions. We need not address the qualified immunity issue, however, because we find no error in the dismissal for failure to state a claim and in the refusal to allow amendment.

> This court reviews de novo the district court's dismissal under Rule 12(b)(6) for failure to state a claim. We accept as true all well-pleaded

> facts, as distinguished from conclusory allegations, and view those facts in the light most favorable to the nonmoving party. The district court's dismissal pursuant to Rule 12(b)(6) will be upheld only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998) (citations and quotation omitted).

In order to state a claim for relief under § 1983, plaintiff must show an affirmative link between defendants' conduct and the alleged constitutional violation. *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1156-57 (10th Cir. 2001). Here, the complaint makes no link between these individual defendants and the acts complained of. The complaint identifies defendants as members of the Commission, Aplt. App. at 8, but does not identify them as members of the Commission during the relevant time

period.[2] The complaint does not allege how any or all of the defendants voted on matters concerning the wells. The complaint does claim that activities of a particular employee of the Commission injured plaintiff, but that individual is not named as a defendant. Further, there is no allegation that any of the defendants personally considered the allegedly improper intervention of this employee or allowed it to influence them.

In its opening brief, plaintiff correctly cites the law requiring personal participation in this type of suit but fails to ultimately show that defendants were directly involved in the acts that resulted in the claimed deprivation of rights. Merely saying that it has shown individual involvement on the part of each defendant does not make *it so*. *See* Aplt. Br. at 17-18.

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[2] The statement in plaintiff's opening brief that the complaint alleged defendants *were* members of the Commission is inaccurate. *See* Aplt. Br.At 16.

Plaintiff also correctly points to various theories of recovery which would state a claim for relief had the correct defendants been named or had these defendants been affirmatively linked to the alleged harm that befell plaintiff. Without the personal participation by each defendant, however, plaintiff's theories are of no avail. Plaintiff cites *Barrett v. Tallon,* 30 F.3d 1296, 1299 (10th Cir. 1994), for the proposition that even if the factual allegations made in a complaint fail to support the legal theory underlying the plaintiff's case, dismissal is inappropriate. In *Barrett,* this court reversed a dismissal under Rule 12(b)(6) because, while the plaintiffs failed to state a RICO claim, they had adequately pleaded claims of "garden variety" fraud and conversion. There is no indication in *Barrett,* however, that the plaintiffs either failed to name the correct defendants or failed to allege personal participation by them. Plaintiff's citation to *Stidham,* 265 F.3d 1144, is similarly unavailing. In *Stidham,* one of the defendants, the director of Utah's Peace Officer Standards and

Training Division, argued that the claims against him must be dismissed because the plaintiff had failed to allege an affirmative link between his conduct and any constitutional violation. This court clarified that such a link is required to be alleged in the complaint as well as proven at trial. *Id.* at 1157. We refused to affirm the dismissal of the complaint against the director, however, because the plaintiff had sufficiently alleged wrongdoing on the part of the defendants as a group and had defined the director as part of that group. *Id.*

Although not part of the published opinion in *Stidham,* the complaint there clearly alleged that the defendant director was the director at the time of the acts complained of.[3] The complaint in the case at bar does not make a similar allegation as to the named defendants and therefore does not state a claim upon which relief can be granted.

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[3] We have ascertained this fact by taking judicial notice of the appellate record in *Stidham* which is still on file in this court.

Finally, plaintiff argues that the district court erred in refusing to grant it leave to amend the complaint. In declining to grant leave to amend, the district court began by noting that defendants had pointed out plaintiff's failure to allege personal participation when they filed their motion to dismiss in the Southern District of Texas. Briefing on that motion was complete before the case was transferred to Colorado. We also note that defendants made the same argument in their renewed motion to dismiss filed in the district court on December 19, 2001. At the time of the district court's ruling here, January 24, 2003, discovery in the case was complete and the deadline for filing dispositive motions had passed without any request from plaintiff to amend the complaint. The district court concluded that "it is patently obvious that the plaintiff cannot prevail under the alleged facts and that an opportunity to amend would be futile." Aplt. App. at

164. We review this conclusion de novo. *Watson ex rel. Watson v. Beckel, 242* F.3d 1237, 1239 (10th Cir. 2001).

We have reviewed the pleadings on file in this case and the other materials of record and agree that granting leave to amend would be futile. As noted above, plaintiff does not allege any personal participation by any of the defendants in its alleged injury. Plaintiff does not dispute that three of the four defendants were not members of the Commission in March 1999 when the wells were ordered plugged. Despite being on notice that defendants would raise the issue of lack of personal participation, plaintiff did not request leave to amend its complaint until the district court was prepared to rule on defendants' renewed motion to dismiss. Even then, the district court found the request to be rather opaque: "There is some suggestion in the papers that the plaintiff should be given leave . . . to replead." Aplt. App. at 163. Further, plaintiff does not indicate in its filings in this court how it would amend the complaint to cure the noted defect. Under these circumstances, we find no error in

the refusal of the district court to grant leave to amend.

The judgment of the district court is AFFIRMED.

Entered for the Court

Michael W. McConnell
Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ALLEN OIL & GAS, LLC Plaintiff – Appellant, v. MICHEAL KLISH; BRUCE JOHNSON; DANIEL SKRABACA; ADRAN PHILLIPS, Defendants - Appellees	No. 03-1082

ORDER

Filed December 29, 2005

Before **McCONNELL, HOLLOWAY** and **PORFILIO,** Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

By:

Deputy Clerk